85-1920

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

GLYNN BATSON, ET AL,
DALE LEVERETT, ET AL,
LOIS PRATHER, ET AL,
T. A. WARTES, ET AL,
A. EARL JONES, ET AL,
DON H. WILSON, ET AL,
and EARL BOWMAN, ET AL,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err in failing to find that Petitioners were denied due process of law by reason of bias and prejudgment on the part of the ASCS County Level Hearing Officer and on the part of the ASCS National Level Hearing Officer?

LIST OF ALL PARTIES TO PROCEEDINGS BEFORE THE COURT OF APPEALS

APPELLEE

United States of America

APPELLANTS

Don H. Wilson	Dempsey Prappas	G. Earnest Caldwell
Jimmy Crook	John H. Stockton	T. V. Leopard
Bobby G. Odom	Robert Freske	Sidney Carter
Earl Bowman	Winston Odom	James R. Odom
Estate of Everett Bowman	Earnest L. Bowman	J. E. Aldridge
	T. A. Wartes	Wayne Hicks
Bill Wartes	Gene Irwin	A. Earl Jones
Darrell Miller	Dale Wiley	Earl Weddle
W. D. Wilson	Bill Williamson	Robert Bowers
Don Kingsley	H. C. Colvin	Robert Kennedy
Dallas Cantwell	Herschel Lowe	Howard McNeill
Stanley Reed	Dale Leverett	Wayne Leverett

Glynn Batson, South Plains Land Corporation, and Lois Prather, each having been an Appellant before the Court of Appeals, have declined to participate in the PETITION FOR A WRIT OF CERTIORARI and, therefore, are not a party hereto.

Of the persons named in the LIST OF ALL PARTIES above, T. V. Leopard, Darrell Miller, Dale Wiley, Don Kingsley, Robert Kennedy and Stanley Reed have wholly failed to honor their agreement for employment of counsel, including specifically their failure to pay attorney's fees and expenses advanced as agreed. Therefore, each have been notified, certified mail - return receipt requested, many months prior to the filing of this PETITION, that counsel declines to further represent them or to file this

PETITION on their behalf. The undersigned, Johnny Roy Phillips, does not purport to represent such persons so named in this paragraph in the filing of this PETITION, except and to the extent, if any, that he may be required to do so by law or by the canons of professional ethics.

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OPINIONS BELOW

The opinion of the Court of Appeals is attached hereto as APPENDIX A. The final judgment and opinion of the District Court are attached hereto as APPENDIX B.

JURISDICTION

The judgment of the Court of Appeals was entered on February 18, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

7 C.F.R. § 722.817

7 U.S.C. § 1385

STATEMENT OF THE CASE

In 1979, the United States sued a number of Defendants (including these Petitioners) to recover cotton subsidy program payments. The trial court rendered judgment for the Defendants and against the Government on grounds not now before the Court in this PETITION. The Government appealed to the United States Court of Appeals for the Fifth Circuit, and the Fifth Circuit, on June 9, 1983, reversed and remanded. On remand, the District Court Judge consolidated all of these seven cases and these seven cases were tried together, after which the trial court entered summary judgment for the Government and against these Petitioners.

These Petitioners thereafter appealed such adverse summary judgment to the Fifth Circuit Court of Appeals, stating in said appeal several grounds. The Fifth Circuit Court of Appeals thereafter on February 18, 1986, entered its judgment in favor of the Government and against these Petitioners, all as is set out in APPENDIX A hereto. These Petitioners now bring this PETITION FOR A WRIT OF CERTIORARI on the grounds that the Court of Appeals erred in failing to find that these

Petitioners were denied due process of law because of bias and prejudgment on the part of the County Hearing Officer and on the part of the National Hearing Officer.

REASONS FOR GRANTING THE WRIT

Perhaps the most fundamental of all due process protection to a citizen vis a vis the power and resources of the Government in an agency administrative process, is his right to a fair hearing before a hearing officer who is fair and impartial and who is not tainted by self interest (for himself or for his agency employer) and who is absolutely free from inherent bias and/or prejudgment. This proposition is supported, without exception, by the cases in all situations involving hearings to determine individual rights as effected by governmental agency rulings, sanctions, and investigations. The following authorities are pertinent to this proposition.

In *Withrow v. Larkin*, 421 U.S. 35, 43 L.Ed.2d 712 (1975), the Court said (p. 713):

> "Concededly, a 'fair trial in a fair tribunal is a basic requirement of due process.' * * * This applies to administrative agencies which adjudicate as well as to courts. * * * Not only is a biased decisionmaker constitutionally unacceptable but 'our system of law has always endeavored to prevent even the probability of unfairness.' * * * In pursuit of this end, various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable."

In *Helena Laboratories Corp. v. N.L.R.B.*, 557 F.2d 1183 (5th Cir., 1977), the Court, quoting from the prior

Fifth Circuit decision in *N.L.R.B. v. Phelps,* 136 F.2d 562, said:

> "(A) fair trial by an unbiased and non-partisan trier of the facts is of the essence of the adjudicatory process as well when the judging is done in an administrative proceeding by an administrative functionary as when it is done in a court by a judge. Indeed, if there is any difference, the rigidity of the requirement that the trier be impartial and unconcerned in the result applies more strictly to an administrative adjudication where many of the safeguards which have been thrown around court proceedings have, in the interest of expedition and a supposed administrative efficiency been relaxed. Nor will the fact that an examination of the record shows that there was evidence which would support the judgment, at all save a trial from the charge of unfairness, for when the fault of bias and prejudice in a judge first rears its ugly head, its effect remains throughout the whole proceedings. Once partiality appears, and particularly when, though challenged, it is unrelieved against, it taints and vitiates all of the proceedings, and no judgment based upon them may stand." 557 F.2d, at p. 1188.

Among numerous cases to the same effect, are *Doraiswamy v. Secretary of Labor,* 555 F.2d 832 (D.C. Cir., 1976); *Amos Treat & Co. v. Securities & Exchange Commission,* 306 F.2d 260 (D.C. Cir., 1964); *Marlboro Corp. v. Ass'n of Independent Colleges,* 556 F.2d 78 (1st Cir., 1977)

The statement of the Court in *Air Transport Association v. Hernandez,* 246 F.Supp. 227 (D.C., 1967), is particularly appropriate, the Court there said (p. 232):

> "* * * The law is clear that where a present interest in maintaining an earlier position inhibits the

free exercise of the decider's mind when the moment of determination arrives, disqualification is an appropriate remedy. The 'very appearance of complete fairness' on the part of Mrs. Hernandez was not present as required by law."

In *King v. Caesar Rodney School District*, 380 F.Supp. 1112 (D. Del., 1974), the Court stated (p. 1119):

"The *Amos Treat and Trans World Airlines* decisions cited by the Supreme Court stand for the proposition that, in the interest of avoiding bias, those members of an agency who are to render an adjudicative decision in a case should not previously have been involved in investigation or advocacy concerning the underlying facts. In *Mack v. Florida State Board of Dentistry, supra,* the count found, *inter alia,* that where the hearing board was kept 'well apprised' of the facts of an investigation as they developed, it could not fairly render a decision. 296 F.Supp. at 1262-1263. * * *

"The recent decisions on this problem find that a substantial pre-hearing familiarity by the decision-makers with the facts of a case disqualifies them from ruling on those facts, and this appears to be the better view. In a somewhat different context, the Court of Appeals for this circuit recently indicated that involvement by an appellate tribunal in an investigation might disqualify both inferior and appellate tribunals from ruling on related factual issues. *Helfant v. Kugler,* 500 F.2d 1188 (3rd Cir. July 8, 1974). In *Simard, Winnick, and Wasson, supra, the Court of Appeals for the Second Circuit has taken the position that prior official contact with a case, through observation, investigation, or prehearing decisions, can create impermissible bias.* Similarly in *Pregent v. New Hampshire, Department of Employment Security,* 361 F.Supp. 782 (D.N.H. 1973). A three-judge court stated, 'If the Chairman

of the Appeal Tribunal did have prior involvement with a claimant's case, either in the investigatory, fact-finding, or decision-making state, we would regard such prior official contact as disqualifying and as violative of due process.' 361 F.Supp. at 797." (emphasis ours)

In *Kephart v. Wilson,* 219 F.Supp. 801 (W.D. Tex., 1963), aff'd 350 F.2d 669 (5th Cir. 1965), cert. denied, 382 U.S. 977, the Court, referring to the improper interposition of the State Administrator in the county committee proceedings said (p. 828):

"* * * In the case of *Accardi v. Shaughnessy, supra,* the Attorney General was held to have improperly interposed himself into the administrative proceedings. In the case of *John A. Johnson Contracting Corp. v. United States, supra,* there was a review of the contracting officer's decision by the War Department Board of Contract Appeals. There was no evidence of any improper influence as to the members of that board. However, the Court of Claims, in reviewing the case, was of the view that, nevertheless, the plaintiff had been prejudiced by the wrongful interposition at the contracting officer level since such interposition was not made known to the War Department Board of Contract Appeals and that Board may have given weight to the decision of the contracting officer. The improper interposition by the Government into administrative proceedings relating to farm allotments has occurred in other cases.

"In the case of *Crolley v. Tatton,* (5th Cir. 1957), 249 F.2d 908, there was involved a denial of a cotton acreage allotment. In the hearing before the Review committee in that case, agents of the Department of Agriculture intruded into the domain of that Committee by meeting with the members of the Committee and discussing aspects of the case with

> them in the absence of the applicant or his attorneys. The Court held that such intrusion was improper and remanded the proceedings to the Board of Review with directions that it make its independent determination in accordance with lawful administrative procedure."

Far from meeting the due process requirements and test set forth in the above cases, the administrative hearings validated by the trial Court judgment here under appeal were replete with evidence of prejudgment and bias on the part of the agency appointed hearing officers, Adams, Senechal and Person. All three were involved directly in the pre-hearing investigations, all three were career employees of the involved governmental agency, and all three had a self interest at each succeeding stage of the administrative process in supporting and upholding the decisions made in the earlier and preceding stages since each had been intimately involved in the making of those preceding administrative decisions.

During the period of time in question, Mr. E. J. Person was Deputy Administrator of the Upland Cotton Programs in the Agriculture Department. Both Mr. Clifton Adams and Mr. Victor Senechal were in the Department under Mr. Person's supervision and control (Tr. 180, 244-289). Mr. Hiram Childress was an attorney in the office of the General Counsel and was assigned to Mr. Adams as his attorney and advised him and the State Committee during the course of the investigations and hearing (Tr. 240-242, 311, 315-316).

Mr. Person received an audit report dated August 30, 1971, the summary of which concluded that producers have established eligibility for non-allotment farms to receive Upland Cotton Program benefits through methods which, although not prohibited by the Program regula-

tions, do not appear to be within the intent of the Program. Mr. Person directed such report back to the Inspector General (Tr. 287-289).

An investigation and report was made by Riley-Church (of the Department of Agriculture) in February and March of 1973, and such investigation and report was discussed by Mr. Church in Washington with Mr. Adams and other officials in the Department (Tr. 189-191, 249-250).

Mr. Adams testified that in early November of 1973 he had a discussion with Mr. Person concerning the situation in Gaines County, at which discussion Mr. Senechal was present, and Mr. Person sent Mr. Adams to Temple, Texas, to discuss the investigation with the OIG investigators in Temple (Tr. 155-156, 245-246).

Mr. Adams testified that he went to Temple and discussed the investigation with Mr. Floyd Grimland, the OIG investigator (Tr. 200-204). Mr. Adams admitted, in response to cross-examination, that his mind was made up at that time that he was going to recommend to Mr. Person that the Gaines County Committee be suspended (Tr. 205).

Introduced into evidence was Mr. Adams' letter to Mr. Grimland, dated November 26, 1973, which was prior to the time that Mr. Adams even went to Gaines County to make his official investigation and determination, that his recommendations had been 100 percent accepted by Mr. Person. Such letter also referred to Mr. Adams' recommendation to Mr. Person that the reconstitutions constituted a scheme or device to defeat the Program, and should be cancelled (S.F. 207-208, 210-213).

After Adams' return to Washington, Mr. Person suspended the Gaines County Committee, and designated

Adams to replace them on November 27, 1973 (Tr. 157-158, 212).

It is further undisputed that on his way to Gaines County to replace the County Committee and to make an official investigation and determination in this matter, Mr. Adams met with the State Committee, which under the administrative procedure established in the Department of Agriculture regulations, was charged with the duty and responsibility of subsequently reviewing any determination made by the County Committee. Such meeting lasted approximately two days, during which time Mr. Adams fully discussed all of the previously conducted investigations with the State Committee, told the State Committee that he had been given authority "to take corrective action", and, in effect, advised the Committee that upon arriving in Gaines County he was going to find that Defendants had engaged in a scheme or device to defeat the purpose of the Program. This was before any hearing or official determination by Mr. Adams, or any review of such determination by the State Committee (Tr. 160-161, 215-219).

Mr. Adams further testified that the State Director and the State Committee are under the supervision of the Department of Agriculture in Washington (Tr. 226).

Mr. Adams then went to Gaines County, examined the investigation and records, and on December 6th (without any notice to Defendants that any inquiry was even pending and without any hearing), officially issued his previously reached decision that Defendants had adopted a scheme or device to defeat the purpose of the Program (Tr. 164-166, 230-232).

Mr. Adams admitted that he read the Riley-Church and other investigation reports before acting as Hearing Of-

ficer, and that his December 6th decision was based, to a large extent, on the OIG investigation reports (Tr. 250, 254).

This resulted in the Defendants' names being placed upon the Debt Register in January of 1974, the effect of which was to cause payment in any other Government program to be withheld up to the amount shown on the Debt Register in connection with this determination and would prevent Defendants from obtaining Government loans (Tr. 223-224) and from participating in many beneficial farm programs.

At this point, after rendering his determination, Mr. Adams then (under Mr. Person's designation) became the County Committee to review his own prior determination (Tr. 166).

Also, in this regard, Mr. Brown, an attorney representing some of the Defendants in the redetermination hearing, testified that he had a conversation with Mr. Adams in Washington in February of 1974, in which Mr. Adams, in effect, admitted that the matter had been prejudged and predetermined, and that any further administrative proceedings would be futile as far as changing Mr. Adams' original determination (Tr. 101-102).

Mr. Senechal, who was Assistant Deputy Administrator and heard the appeal at the Washington level from the State Committee decision, was present during the discussion between Mr. Adams and Mr. Person, before Mr. Adams went to Gaines County to make an official determination of a scheme or device (Tr. 244-246), and was fully aware of that predetermination and the Department's attitude and position.

Mr. Senechal admitted that even prior to his appointment as hearing officer, he was of the opinion "that those people in Gaines County had bilked the government out of six million dollars" (Victor Senechal deposition p. 307, 85). (emphasis added)

The evidence and record cited above, and undisputed so far as is known to this writer, clearly establishes that these Petitioners were denied substantive due process in that the administrative hearing officers had prejudged the matters at issue in accord with their personal bias and in accord with their own self interest as career employees of the involved governmental agency. *When Mr. Senechal said that prior to his appointment as hearing officer he had formed the opinion that "those people in Gaines County had bilked the government out of six million dollars", he closed the door on the Government's contention that this administrative process meets the due process requirements of a fair and impartial hearing officer, free of bias and prejudgment.* (emphasis added)

It is important, perhaps essential to a determination of this PETITION, to recognize that Judge Goldberg incorrectly interpreted the time sequence as to Mr. Senechal's making of the statement, "those people in Gaines County bilked the government out of six million dollars". In the Court of Appeal's opinion, Judge Goldberg, mor than once, stated that Senechal made this statement "several years after the fact". A correct reading of the Senechal deposition, p. 307, 85, clearly reveals that the original statement was made *prior* to the time that Senechal acted as administrative hearing officer. It is true that his deposition was taken several years "after the fact", but the biased and prejudgmental statement was made prior to his acting as administrative hearing officer.

CONCLUSION

The opinion of the Court of Appeals fails to protect the due process rights of these Petitioners to be heard before a fair and impartial administrative hearing officer, and under the facts and the law applicable thereto as above set forth, a writ of certiorari should issue to the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Three copies of the foregoing PETITION FOR A WRIT OF CERTIORARI were mailed to the Solicitor General, Department of Justice, Washington, D.C. 20530, on this the 19th day of May, 1986; and three copies of the foregoing PETITION FOR A WRIT OF CERTIORARI were mailed to Judith Rabinowitz, U. S. Attorney, Commercial Litigation Branch, Civil Division, P. O. Box 261, Ben Franklin Station, Washington, D.C. 20044, on this the 19th day of May, 1986.

JOHNNY ROY PHILLIPS

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 84-1710
OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellee-Cross-Appellant,

v.

GLYNN BATSON AND SOUTHPLAINS
LAND CORPORATION,
Defendants-Appellants Cross-Appellees,

and

JOHNNY LEMMONS,
Defendant-Cross-Appellee
(and related Cases No. 84-1711-1716).

(Filed February 18, 1986)

Before: Irving L. Goldberg, E. Grady Jolly
and Patrick E. Higginbotham, Circuit Judges.

Opinion by Judge Irving L. Goldberg

Appeal from the United States District Court
for the Northern District of Texas

Halbert O. Woodward, Chief Judge, Presiding

SUMMARY

Agriculture/Administrative Law

Appeal from summary judgment enforcing an administrative determination by the Agricultural Stabilization

and Conservation Service (ASCS) that appellants had knowingly engaged in a scheme or device to defeat the purpose of the Upland Cotton Program or to evade the program limitation. Appeal from denial of prejudgment interest. Affirmed in part, reversed in part and remanded.

Appellants allege that the administrative proceedings violated due process due to (1) an inordinate delay in the adminstrative process, (2) bias and prejudgment on the part of hearing officers, and (3) lack of an opportunity to call, confront, and cross-examine witnesses. Some appellants claimed that as "operators," they could not be held liable under a regulation that only required refunds from "producers." Others claimed they did not receive the payments.

[1] 7 U.S.C. § 1385 precludes this Court from reviewing the ASCS's findings of fact. [2] The factual determinations—that although some of the defendants were not "producers" and did not "receive" program payments for 7 C.F.R. § 722.817 purposes, they nevertheless collaborated and acted knowingly to evade the regulations —are entitled to conclusive effect as well. [3] However, finality attaches only to those facts that constitute the basis for program payments.

[4] absent a showing of demonstrable prejudice from an arbitrary and capricious delay, and absent a request from appellants that the administrative hearings proceed notwithstanding the criminal investigations, appellants have not made out a violation of due process due to delay.

[5] Appellants alleged that they were denied due process because a hearing officer at the county level and a hearing officer at the national level were biased and had

prejudged the cases against them. Although the national hearing officer several years later made a statement that "those people in Gaines County had bilked the government out of six million dollars," he denied in the same deposition that he ever prejudged any of the cases. [6] The combination roles of investigator and adjudicator in the county officer did not violate the Administrative Procedures Act or due process.

[7] No hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective. [8] The claim that appellants were denied the right to confront and cross-examine government witnesses is rejected.

[9] Prejudgment interest is warranted as a matter of federal law. The case was remanded with instructions to enter an award of interest of 6% from the date the subsidies were paid.

OPINION

IRVING L. GOLDBERG, Circuit Judge:

Some farmers from Gaines had a plan.
It amounted to quite a big scam.
But the payments for cotton
began to smell rotten.
Twas a mugging of poor Uncle Sam.

The ASCS and its crew
uncovered this fraudulent stew.
After quite a few hearings,
the end is now nearing—
It awaits our judicial review.

The United States initiated these seven suits in 1979 to enforce administrative determinations of the Agricultural Stabilization and Conservation Service (ASCS), which ordered appellants to refund overpayments of cotton subsidies obtained in 1972 and 1973 through a scheme or device to defeat the purpose of the Upland Cotton Price Support Program, 7 U.S.C. § 1444(e), or to evade the program payment limitation. The scheme first came to the attention of the ASCS when audit reports revealed that program payments to recipients in Gaines County, Texas, were five times that of comparable cotton producing regions.

The scam involved millions of dollars, and the facts underlying the cases are set out in detail in *U.S. v. Batson*, 706 F.2d 657, 659-71 (5th Cir. 1983). Suffice it to say here that by combining the operation of two farms whose yield and payment rates under the program differed significantly, the appellants created a synergistic union in which the combined or "reconstituted" farm received payments several times greater than the sum of the payments that each farm would have received separately. Several appellants were not involved in the actual selection and reconstitution of the farm lands, but they nonetheless managed to undermine the program by other means. "In several cases, they (1) leased parts of such farms because of the high program payments these tracts would command; (2) were only 'straw' tenants, not actually farming the land but enabling the farm operator to evade the $55,000 program limitation; or (3) were not actually separate 'persons' entitled to payments within the regulations." *Id.* at 666.

After hearings at the county, state, and national level, the ASCS determined that appellants had knowingly en-

gaged in a scheme or device to defeat the purpose of the Upland Cotton Program or to evade the program limitation. When appellants refused to refund the amounts for which they had been held liable, the United States filed twelve suits in 1979 to enforce the administrative determinations. The government pursued one case in advance of the others to test its theory that the determinations were final and nonreviewable under 7 U.S.C. § 1385. In that case, the district court awarded the United States summary judgment, and this court affirmed. *United States v. Jones,* Civil Action No. CA 5-79-56 (N.D. Tex., Memorandum May 12, 1980; Final Judgment Oct. 22, 1980), *aff'd mem.*, 659 F.2d 1073 (5th Cir. 1981).

When the government sought summary judgment in the remaining eleven cases, including the seven here, some new issues had been raised and the district court dismissed the government's complaints on the alternative grounds that the statute of limitations had run or that the applicable regulation was unconstitutionally vague and overbroad.[1] The government appealed, and this court reversed the district court on both grounds and remanded the cases. *United States v. Batson,* 706 F.2d 657 (5th Cir. 1983). This prior appeal left open the issues that are before us now.

On remand, the United States renewed its motion for summary judgment, again asserting the finality of the ASCS determinations under 7 U.S.C. § 1385. The appellants responded that the administrative proceedings were riddled with violations of due process. Alleged violations included inordinate delay in the administrative process,

1. At this point, the four cases not on appeal here took a separate procedural route.

bias and prejudgment on the part of hearing officers, and the lack of an opportunity to call, confront, and cross-examine witnesses. Some appellants also claimed that, as "operators," they could not be held liable under a regulation that only required refunds from "producers." Others claimed that they never actually received any payments. The district court rejected each of defendants' claims, entered summary judgment in favor of the United States, and assessed an award in the amount of the subsidy overpayments as determined by the agency, plus interest from the dates of the final agency determinations. On the basis of 7 C.F.R. § 722.812(k)(1974), the United States moved to amend the judgments to provide interest from the dates the payments were issued. That motion was denied without explanation.

Both parties appealed. The defendants appeal the district court's grant of summary judgment, and the government seeks an award of interest in accord with its reading of the regulation. We affirm the judgment of the district court, but we reverse as to its award of interest.

I. SCOPE OF REVIEW

[1] Our review of the ASCS's determination is restricted by 7 U.S.C. § 1385, which provides in relevant part:

> The facts constituting the basis for any . . . payments under the cotton set-aside program . . . when officially determined in conformity with the applicable regulations . . . shall be final and conclusive and shall not be reviewable by any other officer or agency of the Goverment.

As appellants do not contend that the ASCS violated its own regulations, this provision precludes this court from reviewing the ASCS's findings of fact. *United States v. Jones, supra; see also United States v. Blackwell,* 467 F.2d 1377 (5th Cir. 1972) (holding that 7 U.S.C. § 1785, which contains identical language, precludes review of agency findings of fact).

[2] Several of the appellants argue that they cannot be held liable for refunds under 7 C.F.R. § 722.817 because they are not "producers" and did not "receive" program payments. 7 C.F.R. § 722.817, as amended, provides:

> A *producer* who is determined by the State committee, or the county committee with the approval of the State committee, to having knowingly . . . adopted any scheme or device which tends to defeat the purpose of the program, . . . shall not be entitled to payments for any farm under the program and shall refund to the Commodity Credit Corporation all payments *received* by him with respect to the program.

(emphasis added).

As the district court noted on remand, however, the government

> does not dispute the fact that some of the defendants were not "producers." The point is that the entire scheme to evade the regulations, and particularly the $55,000.00 per producer payment limitation, was the joint effort of producers and operators. The defendants who are claiming innocence in the fact that they were operators and not producers were operators for the sole purpose of evading the regulations;

> the defendant operators retained tracts equaling the $55,000.00 limit, then leased the rest to other defendant "producers" and indirectly received the subsidy payments in the guise of rent. The agency found that the collaborators—both the operators/lessors and producers/lessees—acted *knowingly* to evade the regulations.

Order at 6.

On prior appeal, this court noted that this ASCS determination—that several defendants received program funds indirectly in the guise of rent—

> may not necessarily be entitled to the 'conclusive' effect ASCS factual findings otherwise receive by virtue of 7 U.S.C. § 1385. . . . Whether they did or did not in fact receive such payments may require a *de novo* judicial determination. This judicial inquiry is required to determine whether these appellees were properly subject to the authority of the ASCS compliance review process and thus to the application of section 1385.

U.S. v. Batson, 706 F.2d at 684 (citation omitted). We hold today that these factual determinations are also entitled to conclusive effect.

The question is whether the schemes through which both operators and producers attempted to avoid the program limitations by leasing tracts of land are "facts constituting the basis for . . . payments under the cotton set-aside program." 7 U.S.C. § 1385. We believe these schemes clearly are such facts. Absent the schemes, the payments to the lessees would not have been made, and the lessors would not have received their "rent."

The anomaly in holding otherwise is readily apparent. We have already held that the schemes of these operators fall within the proscription of the regulations. *U.S. v. Batson,* 706 F.2d at 682. *Cf. Baldridge v. Hadley,* 491 F.2d 859, 864-65 (10th Cir.), *cert. denied,* 417 U.S. 910 94 S. Ct. 2608 (1974). We have no reason to believe that ASCS officials are any less competent to determine facts in this area than they are when program participants receive payments directly. Nor can we discern any reason why defendants who concoct particularly ingenious methods of receiving program payments should receive a trial de novo, while their less stealthy counterparts must content themselves with administrative process alone. If the preclusive effect of 7 U.S.C. § 1385 reaches one set of prohibited schemes, there is no basis in either logic, policy, or the statute to prevent it from reaching another equally prohibited set of schemes. The lessors here were "properly subject to the authority of the ASCS compliance review process and thus to the application of section 1385." *U.S. v. Batson,* 706 F.2d at 684.

[3] Section 1385 does not, however, accord finality to the administrative determination as a whole. Rather, finality attaches in these cases only to those findings of facts that constitute the basis for program payments. A reviewing court thus finds itself in a position analogous to that of a court confronting a properly presented motion for summary judgment where the facts—determined by administrators in this case—are not in dispute. Only the legal questions remain for review. Of course, the statute does not preclude review of those facts that do not constitute the basis for program payments, such as those underlying alleged constitutional violations. It is to this review that we now turn.

II. DUE PROCESS CLAIMS

Appellants claim that the administrative findings must be set aside because the administrative process was flawed by three distinct violations of their right to procedural due process: first, that the delay in the administrative proceedings gave rise to a due process violation; second, that administrative officials who heard the cases were biased and had prejudged appellants' liability; and third, that appellants were denied the right to call, confront, and cross-examine witnesses. On the record before us, each of these claims is without merit.

A. *Delay in the Administrative Proceedings*

[4] In some circumstances, delay in the administrative process can rise to the level of a denial of due process. *Fusari v. Steinberg,* 419 U.S. 379, 389, 95 S. Ct. 533, 540 (1975) ("rapidity of administrative review is a significant factor in assessing the sufficiency of the entire process"); *Mathews v. Eldridge,* 424 U.S. 319, 341-42, 96 S. Ct. 893, 906 (1976). In *Kelly v. Railroad Retirement Board,* 625 F.2d 486, 490 (3rd Cir. 1980), for example, a delay of nearly four years in processing a single application for disability benefits was found to be "wholly inexcusable" and a denial of due process.

In the cases now before us, a period of over four years elapsed between the initial determinations at the county level and the final decision at the national level. As the district court noted, however,

> The defendants have not specified what part of the proceedings were delayed but merely assert that some delay, which was allegedly the fault of the United States, violated due process. The only delay

> reflected in the record was for a criminal investigation (of the same matter). Such a delay was to protect the Fifth Amendment rights of the defendants, not to violate their due process rights. *See Polcover v. Secretary of Treasury,* 477 F.2d 1223, 1232 (D.C. Cir. 1973).

The hearings and determinations at the county and state level were completed in a year and a half. At that point, the ASCS suspended the proceedings at the national level to allow the United States Attorney time to investigate whether the appellants' activities provided a basis for criminal prosecution. As soon as the U.S. Attorney notified the ASCS that he had completed his investigation, the ASCS proceeded with its review.

The cases cited by appellant for the proposition that delay in the administrative proceedings denied them due process are wholly inapposite. In *Kelly, supra,* delay in the administrative process deprived the recipient of benefits to which she was otherwise entitled and on which her very health depended. In cases of that type, the private interest in a prompt and speedy determination of benefits weighs heavily in any analysis of what process is due. *Mathews v. Eldridge,* 424 U.S. 319, 335, 96 S. Ct. 893, 903 (1976). The "possible length of wrongful deprivation of . . . benefits is an important factor in assessing the impact of official action on the private interests." *Fusari v. Steinberg,* 419 U.S. at 389.

Other than the interest that every defendant has in being relieved of the uncertainty brought on by pending proceedings, appellants lack any significant interest in having the ASCS resolve its complaint promptly while they continue to retain possession of the subsidies. More-

over, due process cannot be said to compel haste in a civil matter where that haste could significantly prejudice the private party's position in a concurrent criminal investigation. In *Polcover v. Secretary of Treasury*, 477 F.2d 1223, 1232 (D.C. Cir. 1973), the court recognized that to compel a defendant to participate in an administrative hearing while criminal charges were pending could force the defendant to disclose evidence necessary to his defense in a criminal trial. *See also Silver v. McCamey*, 221 F.2d 873 (D.C. Cir. 1955); *Cohen v. United States*, 369 F.2d 976 (Ct. Cl. 1967). The defendant is then faced with the unenviable choice of proceeding to a final administrative determination at the risk of prejudicing his criminal defense, or forfeiting a possibly meritorious administrative claim to preserve his criminal defense. Absent a showing of demonstrable prejudice from an arbitrary and capricious delay, and absent a request from appellants that the administrative hearings proceed notwithstanding the criminal investigations, appellants have not even begun to make out a violation of due process. *Polcover, supra; Cohen v. U.S.*, 369 F.2d at 988. The ASCS acted properly herein suspending the administrative proceedings pending the resolution of the criminal investigation.

B. *Bias and Prejudgment*

[5] Appellants allege that they were denied due process because both Clifton Adams, the hearing officer at the county level, and Victor Senechal, the hearing officer at the national level, were biased and had prejudged the cases against them. Appellants base their claim against Senechal on a statement, given in a deposition several years after the fact, that "those people in Gaines County

had bilked the government out of six million dollars." Senechal Dep. at 85. They fault Adams for his involvement in the prior administrative investigation and for his decision prior to the county hearing to cancel the reconstitutions and allotment transfers that formed the heart of appellants' scheme to abuse the program.

It goes without saying that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136, 75 S. Ct. 623 (1955). This stricture applies equally

> to administrative agencies which adjudicate as well as to courts. Not only is a biased decisionmaker constitutionally unacceptable but "our system of law has always endeavored to prevent even the probability of unfairness."

Withrow v. Larkin, 421 U.S. 35, 46-47, 95 S. Ct. 1456 (citations omitted). The Supreme Court noted in *Withrow* that

> various situations have been identified in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable. Among these cases are those in which the adjudicator has a pecuniary interest in the outcome and in which he has been the target of personal abuse or criticism from the party before him.

Id. at 47 (footnotes omitted).

[6] At the outset, we note that appellants have alleged neither of these two indicators of bias, nor have appellants alleged that these administrators had prejudged individual cases or were biased against particular individuals. At

best, appellants have alleged that the roles of investigator and adjudicator were combined in Clifton Adams and that this combination gives rise to an inference of bias.

The Supreme Court considered this contention in *Withrow*:

> The contention that the combination of investigative and adjudicative functions necessarily creates an unconstitutional risk of bias in administrative adjudication has a much more difficult burden of persuasion to carry. It must overcome a presumption of honesty and integrity in those serving as adjudicators; and it must convince that, under a realistic appraisal of psychological tendencies and human weakness, conferring investigative and adjudicative powers on the same individuals poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented.

Id. at 47. The Court then squarely rejected the argument:

> It is also very typical for the members of administrative agencies to receive the results of investigations, to approve the filing of charges or formal complaints instituting enforcement proceedings, and then to participate in the ensuing hearings. This mode of procedure does not violate the Administrative Procedure Act, and it does not violate due process of law.

Id. at 56.

Senechal's deposition statement that "those people in Gaines County had bilked the government out of six million dollars," could be read, depending on the context, as strong evidence of prejudgment. However, Senechal

denied in the same deposition ever having prejudged any of the cases.[2]

In this context, Senechal's statement is, to borrow the government's analogy, "no different or more egregious than a trial judge telling a jury that a murder has occurred. The bullet-riddled body is proof of the murder; what the judge cannot say is that the defendant shot the gun." Appellee's Brief at 32.

Even were we to assume that the hearing officers had decided beforehand that the facts constituted a prohibited

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2. The full context is:

Q. . . . considerably prior to your appointment as hearing officer you knew that—and this is a direct quote from you—"that those people in Gaines County had bilked the government out of sir million dollars."

A. Yeah.

Q. Mr. Senechal, how can a man who already believes that act as a fair and impartial hearing officer.

A. I had no problem acting as a fair and impartial hearing officer.

Q. Just so you got back that six million dollars that you already knew they had bilked the government out of?

A. Not necessarily, if they—if they had, after a fair hearing I had made a determination they were not involved of [*sic*] any planned action to try to achieve additional financial gain from the program, no.

Senechal dep. at 307.

Elsewhere in his deposition, Senechal gave the following testimony:

Q. But you had pretty well decided before you were a hearing office[r] [*sic*] that a lot of these things were wrong, and until the individuals came in and established their innocence, as far as you were concerned, they had violated the regulations.

A. Well, I think the results we got from the investigation established that there was something drastically wrong. I did not pin it down to any individual at that point in time because of the fact that we still had the appeal regulations, and whatever determination was made by Mr. Adams, acting for the county committee, that individual, whoever the adverse determination was made, had the right to appeal all the way to Washington. But we did not make any—I did not make any predeterminations on any particular case.

Dep. at 249.

scheme or device, no violation of due process would be present. In *FTC v. Cement Institute*, 33 U.S. 683, 68 S. Ct. 793 (1948), the Court rejected a claim that members of the FTC disqualify themselves because they had, prior to a hearing on the legality of a pricing scheme, already formed an opinion that the defendants' pricing system was illegal.

> [T]he fact that the Commission had entertained such views as the result of its prior ex parte investigations did not necessarily mean that the minds of its members were irrevocably closed on the subject of the respondents' basing point practices. Here, in contrast to the Commission's investigations, members of the cement industry were legally authorized participants in the hearings. They produced evidence —volumes of it. They were free to point out to the Commission by testimony, by cross-examination of witnesses, and by arguments, conditions of the trade practices under attack which they thought kept these practices within the range of legally permissible business activities.

Id. at 701 (quoted in *Withrow v. Larkin*, 421 U.S. at 48). Appellants here had similar opportunities in three distinct, de novo hearings.

Quite simply, there is no significant evidence to indicate that any hearing officer's mind was irrevocably closed, not is there any evidence from which we could reasonably infer that either Adams or Senechal were biased. Finally, perhaps the most telling evidence of their lack of bias and prejudgment is that fact that of the 195 farmers against whom Mr. Adams issued initial decisions, 85 were later relieved of liability upon Mr. Adams' recommendations and 8 were exonerated in whole or in part on administrative appeal.

C. *Lack of Pre-determination Hearing or Opportunity to Subpoena and Cross-examine Witnesses*

[7] Under this general heading, appellants first challenge the lack of notice and hearing prior to Adams' initial determinations of liability. The agency conducted an investigation, made a determination, and then notified appellants in accordance with the regulations. At that point, the appeal regulations provided the defendants with opportunity for reconsideration and appeal at the county, state, and national levels. 7 C.F.R. §§ 780 *et seq.* Appellants' claim is make-weight. Due process requires only "that there is at some stage an opportunity for a hearing." *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594, 599 (1950). The Supreme Court has "repeatedly held that no hearing at the preliminary stage is required by due process so long as the requisite hearing is held before the final administrative order becomes effective." *Id.* at 598. *Cf. Hilburn v. Butz*, 463 F.2d 1207, 1209 (5th Cir. 1972) (due process does not require the ASCS to give notice and hearing before withholding legitimately earned subsidies pending resolution of a disputed overpayment in a previous year).[3]

[8] The appellants also contend that they were denied the right to confront and cross-examine government witnesses. As the district court held, however, appellants are grabbing at imaginary straws:

> The defendants' general assertion implies that hearings were held at which the government called witnesses, but did not allow them to be questioned

3. *But see Goldberg v. Kelly*, 397 U.S. 254, 264 (1970) (pre-termination hearing required where the termination of welfare "may deprive an *eligible* recipient of the very means by which to live while he waits.")

> by the defendants—an obvious denial of due process. The defendants further imply that the record contains instances in which a request for the testimony of a witness was made by a defendant and specifically denied by the government. Both implications are completely inaccurate. On the contrary, the agency made it clear from the *outset* that, though the defendants had the right to a hearing and to submit evidence and witnesses, it was the responsibility of the *defendant* to obtain the presence of such witnesses. The government stated on numerous occasions that the agency had no subpoena power and could not compel the testimony of witnesses, and that any testimony, including that of government employees, would have to be obtained voluntarily. . . . There is no evidence in the record of any attempt by the defendants to obtain the voluntary testimony of any witnesses.

Order at 8. These identical points were raised by appellants and rejected in *U.S. v. Jones, supra, aff'd mem.*, 659 F.2d 1073 (5th Cir. 1981). On this record, we can discern no violation of due process.[4]

III. INTEREST

[9] The district court awarded interest on the refunds from the date of the ASCS's final determinations. The United States claims, on the basis of 7 C.F.R. § 722.-812(k) and the general policy underlying awards of prejudgment interest, that interest should run from the date

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4. Appellants apparently object to the government's use of investigative reports to support the refund determinations. As the government points out, the investigators' value as witnesses was minimal, as they merely compiled farm records and obtained sworn witness statements. The source of each fact was identified in the reports and became a part of the record. Had the appellants wished to challenge anything in the reports, the appropriate point of attack would have been either the witnesses themselves—most of whom resided in and around Gaines County—or the farm records.

of the program payments. 7 C.F.R. § 722.812(k) provides:

> Payments to any producer which exceed the total payment he earns under the program with respect to any farm shall be refunded to the Commodity Credit Corporation, and if for any reason such earned payment is zero, he shall pay interest at the rate of 6 percent per annum on the amount of the refund from the issue dates of the sight drafts to the date the payments are refunded. . . .

The basic interest statute under federal law, 28 U.S.C. § 1961, provides:

> Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at the rate allowed by State law.

The district court, in awarding interest from the date of the final administrative judgment, apparently relied on this statute, although an argument could be made that the statute only authorized an award of interest from the date of judgment in the district court. Regardless of the merits of this argument, we believe the district court erred in denying interest from the dates the subsidies were paid.[5]

> The statute does not limit successful plaintiffs to interest from the date of their judgments. Rather it indicates that the judgment itself will bear interest as a matter of law, from the date it is entered, and leaves to other principles of law the issue of whether the judgment itself will include prejudgment interest as part of the plaintiff's compensation. As stated in

5. Appellants have not contested the United States' cross-appeal on interest.

> *Louisiana & Ark. Ry. Co. v. Export Drum Co.*, 359 F.2d 311, 317 (5th Cir. 1966), "§ 1961 . . . has nothing to do with the question of whether prejudgment interest shall be allowed *as part of the compensation awarded to make the injured party whole.*"

Illinois Central Railroad Co. v. Texas Eastern Transmission Corp., 551 F.2d 943, 944 (5th Cir. 1977).

As a matter of federal law, *see Export Drum Co., supra,* prejudgment interest is clearly warranted. First, the regulation in effect at the time the subsidies were paid required prejudgment interest, and appellants, by participating in the program, can be said to have submitted to this condition. Second, "a sum certain is in controversy. As the common law recognizes in analogous situations, the only way the wronged party can be made whole is to award him interest from the time he should have received the money." *Id.* at 317. The United States has been wrongfully deprived of these funds since 1973. To deny the government prejudgment interest would grant appellants a windfall equal to the value of the use of the funds since that time. Accordingly, we reverse the district court's award of interest and remand with instructions to enter an award of interest of 6% from the date the subsidies were paid.

IV. CONCLUSION

With thought and comment most candid,
affirmance shall now be commanded.
But the court below missed
the prejudgment interest:
The cases are therefore remanded.

AFFIRMED IN PART, REVERSED IN PART AND REMANDED.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
LUBBOCK DIVISION

CIVIL ACTION NO. CA-5-79-53
UNITED STATES OF AMERICA
v.
GLYNN BATSON, et al.;

CIVIL ACTION NO. CA-5-79-55
UNITED STATES OF AMERICA
v.
DALE LEVERETT, et al.;

CIVIL ACTION NO. CA-5-79-57
UNITED STATES OF AMERICA
v.
LOIS PRATHER;

CIVIL ACTION NO. CA-5-79-73
UNITED STATES OF AMERICA
v.
T. A. WARTES, et al.;

CIVIL ACTION NO. CA-5-79-74
UNITED STATES OF AMERICA
v.
A. EARL JONES, et al.;

CIVIL ACTION NO. CA-5-79-75
UNITED STATES OF AMERICA
v.
DON H. WILSON, et al.;

CIVIL ACTION NO. CA-5-79-84

UNITED STATES OF AMERICA

v.

EARL BOWMAN, et al.

(Filed June 13, 1984)

ORDER

I.

The United States filed suit to recover overpayment of cotton subsidies made in 1972 and 1973 under the Upland Cotton Price Support Program, 7 U.S.C. § 1444(e) (1974). This court dismissed the United States' complaints on statute of limitations and constitutional grounds. The Fifth Circuit affirmed the dismissal of the United States' claims for 1972 payments based on statute of limitations, but reinstated the complaints in all other respects, holding that limitations did not bar the actions based on the 1973 payments and that the regulations under which the United States sought recovery were not unconstiutionally vague. The remaining issues are now before this court on remand. The plaintiff filed Motions for Summary Judgment based on the finality of the agency determinations under 7 U.S.C. § 1385. The defendants filed Motions to Dismiss and alternative Motions for Summary Judgment in favor of the defendants. For the following reasons, the United States' Motions for Summary Judgment are *granted*, and the defendants' Motions to Dismiss and alternative Motions for Summary Judgment are *denied*.

The plaintiff filed identical Motions for Summary Judgment, but attached a separate appendix for each case. The appendices contain the final Agricultural Stabilization and Conservation Service (ASCS) determination, as well

as the county and state level administrative reconsiderations in each case. The Government motions are based on the statutory nonreviewability of the administrative determination. 7 U.S.C. § 1385. *United States v. Jones*, CA-5-79-56, (N.D. Tex. Memorandum May 12, 1980, Final Judgment October 22, 1980), *aff'd mem.*, 659 F.2d 1073 (5th Cir. 1981).

The defendants responded by filing Defendants' Motion to Dismiss, Opposition to Plaintiff's Motion for Summary Judgment, and Alternatively, Motion for Summary Judgment in Behalf of the Defendants.[1]

The defendants raise a myriad of issues in their responsive motions, but do not contend there are any disputed issues of fact as to the basis of the findings. The principal argument made by the defendants is that the administrative determinations upon which the Government relies were made in violation of the applicable regulations and procedural due process. The defendants attached no affidavits or documentary evidence, nor did they refer to the administrative record on file to support their contentions and did not comply with the obligations imposed upon them by Rule 56(e), Federal Rules of Civil Procedure, and Local Rule No. 5.2(a). Though the defendants allude to potential due process problems, the allegations are general and conclusory. For example, the defendants do not list the necessary witnesses that were unavailable for cross-examination nor do the de-

1. Defendants Batson and Prather filed one responsive motion; defendants Caldwell, Lemmons and Prappas filed separate but identical responses (Lemmons is a defendant in the *Batson* case, Caldwell and Prappas are defendants in the *Jones* case); and defendants Leverett, Wartes, Jones, Wilson and Bowman filed one motion. Each defendant, however, adopted the briefs and motions of every other defendant, so that every issue raised must be addressed with respect to each defendant.

fendants explain precisely how the administrative proceedings were affected by "prejudgment and bias." Despite the inadequacy of the defendants' responses, the court will address each contention.

II.

The court's review of ASCS final administrative determinations is limited by statute. 7 U.S.C. § 1385 states that:

> The facts constituting the basis for any . . . payment under . . . upland cotton . . . authorized by the Agricultural Act of 1949 [7 U.S.C.A. § 1421 *et seq.*] and this chapter, any or price support operation, or the amount thereof, when officially determined in conformity with the applicable regulations prescribed by the Secretary . . . shall be final and conclusive and shall not be reviewable by any other officer or agency of the Government.

The United States Court of Claims explained the circumscribed power of judicial review in *Gross v. United States,* 505 F.2d 1271 (Ct. Co. 1974). In that case, the ASC committee found that the plaintiff had violated several Seed Grain program regulations and ordered refund of certain payments; the government also withheld subsequently earned payments as a set-off against the debt. The plaintiff sued to have the payments released, claiming that the government had violated the Department of Agriculture regulations, and the government counterclaimed for summary judgment. The court held that the plaintiff had the burden in his attack on the administrative determinations, and that burden was not met by the general, conclusory and unsupported allegations made by the plaintiff. *Id.* at 1275-6. The plaintiff's "general allega-

tion of noncompliance cannot overcome the strong presumption that Government officials acted properly and faithfully discharged their duties and that the regulations and procedures involved were properly observed and carried out." *Id.* at 1276.

The court granted the government's motion based on the finality of the agency's factual determinations under 7 U.S.C. § 1385. All that section leaves for review, according to the court, are questions of law or allegations and *proof* by the plaintiff that the decisions of the agency based on its factual determinations were arbitrary and capricious or constitute a denial of due process. *Id.* at 1279. The scope of review is narrow and the burden upon the party contesting the agency decision is great. "In the absence of a complete disregard or unjustifiable interpretation of the facts and the procedural and substantive regulations of the Secretary, which is not present here, this Court will follow the statutory mandate of Congress and refuse to review either the fact constituting the basis for payment or the amount thereof. . . ." *Id.* at 1278.

Similarly in the case at hand, the defendant's unsupported allegations of denial of due process are insufficient to overcome the strong presumption in favor of the agency findings. And further, the findings of the ASCS and the decisions based on these findings were not arbitrary or capricious, and it would thwart the clear congressional scheme for this court to substitute its judgment or findings of fact for that of the ASCS.

III.

The defendants first argue that they cannot be held liable for refund under 7 C.F.R. § 722.817 because they

are not "producers" and did not "receive" program payments. 7 C.F.R. § 722.817, as amended provides:

> A *producer* who is determined by the State committee, or the county committee with the approval of the State committee, to having knowingly . . . adopted any scheme or device which tends to defeat the purpose of the program, . . . shall not be entitled to payments for any farm under the program and shall refund to the Commodity Credit Corporation all payments *received* by him with respect to the program.

(emphasis added).

The Government does not dispute the fact that some of the defendants were not "producers." The point is that the entire scheme to evade the regulations, and particularly the $55,000.00 per producer payment limitation, was the joint effort of producers and operators. The defendants who are claiming innocence in the fact that they were operators and not producers were operators for the sole purpose of evading the regulations; the defendant operators retained tracts equaling the $55,000.00 limit, then leased the rest to other defendant "producers" and indirectly received the subsidy payments in the guise of rent. The agency found that the collaborators—both operators/lessors and producers/lessees—acted *knowingly* to evade the regulations; a finding with which the Fifth Circuit has concurred. *United States v. Batson,* 707 F.2d 682-3 (5th Cir. 1983). 7 C.F.R. § 722.817 is a broad remedial regulation, intended to thwart such a scheme. *Id.* at 683. Technical distinctions placing form over substance should not be allowed to obstruct the purpose of the regulations. Further, the

form over substance argument does not alter the finality of agency findings under 7 U.S.C. § 1385.

IV.

The defendants next argue that the administrative determinations are invalid because of "inordinate delay in the administrative process." The defendants have not specified what part of the proceedings were delayed but merely assert that some delay, which was allegedly the fault of the United States, violated due process. The only delay reflected in the record was for a criminal investigation (of the same subject matter). Such a delay was to protect the Fifth Amendment rights of the defendants, not to violate their due process rights. *See Polcover v. Secretary of Treasury*, 477 F.2d 1233 (D.C. Cir. 1973). With several criminal investigations going on, it was unlikely that the defendants could adequately interrogate and question potential witnesses in this case because of their knowledge of the possibility that criminal implications might be widespread. Delay for this reason is fully justified and does not afford a denial of due process.

V.

The defendants' main contention is that they were denied their due process rights to cross-examine the Government's witnesses during the administrative hearings. Again, the defendants make an unsupported and general allegation. At the hearing on May 23, 1984 the defendants, for the first time, introduced evidence in support of their due process argument. The court postponed ruling on the motion and gave defendants leave to submit additional support in the record for their contentions. The court, now having before it the additional submissions of

the defendants and responsive submissions from the government, finds that such evidence reflects no denial of the defendants' due process rights.

Though the defendants make the general argument that they were denied due process because they were not allowed to confront and cross-examine witnesses against them, their argument is two-part. First, defendants assert that their "constitutional right to confrontation and cross-examination is effective only if granted and given *prior* to the *first* administrative determination. Once Mr. Adams . . . had made the initial administrative determination in violation of due process for failure to allow confrontation and cross-examination, then, thereafter, all future administrative determinations are tainted with that deprivation of due process." Defendants post-hearing letter, dated May 28, 1984. (emphasis added). Second, defendants argue essentially that the government's lack of subpoena power violates due process.

V. A.

The fact that the ASCS held no hearings prior to making its *initial* determination of liability does not constitute a violation of due process. *See Ewing v. Mytinger & Casselberry,* 339 U.S. 594, 598-600 (1950). The agency conducted an investigation, made a determination and then notified the defendants in accordance with the regulations. At that point, the appeal regulations provide the defendants with opportunity for reconsideration and appeal at the county, state, and national levels. 7 C.F.R. §§ 780 *et seq. See Mackatunas v. Finch,* 301 F. Supp. 1289 (E.D. Pa. 1969) (use of statements not subjected to cross-examination is permissible before administrative

agencies and does not constitute a denial of due process, *citing Cohen v. Perales,* 412 F.2d 44 (5th Cir. 1969)). *See also American Public Gas Association v. Federal Power Commission,* 498 F.2d 718, 723 (D.C. Cir. 1974) ("The petitioners complain that they were denied the right to test through cross examination the underlying bases for the submitted data. Even in a formal adjudicatory hearing under the APA, however, cross examination is not always a right."). The procedures set out in the regulations comport with due process, and the record in these cases show that the regulations were followed. *See Gross v. United States,* 505 F.2d 1271 (Ct. Cl. 1974).

V. B.

The defendants' argument that, because the government lacked subpoena power, they were not allowed to cross-examine witnesses and were thus denied due process, is also without merit. First, it should be noted that the court is well aware of the fact that the defendants repeated their broad allegations of denial of due process throughout the course of the administrative proceedings.

The defendants' general assertion implies that hearings were held at which the government called witnesses, but did not allow them to be questioned by the defendants—an obvious denial of due process. The defendants further imply that the record contains instances in which a request for the testimony of a witness was made by a defendant and specifically denied by the government. Both implications are completely inaccurate. On the contrary, the agency made it clear from the *outset* that, though the defendants had the right to a hearing and to submit evidence and witnesses, it was the responsibility of the

defendant to obtain the presence of such witnesses. The government stated on numerous occasions that the agency had no subpoena power and could not compel the testimony of witnesses, and that any testimony, including that of government employees, would have to be obtained voluntarily. *See* post-hearing submission of defendants. There is no evidence in the record of any attempt by the defendants to obtain the voluntary testimony of any witnesses. Had there been evidence in the record that: (1) the defendants attempted to obtain the testimony of a particular government employee, (2) that employee had refused to be questioned, (3) the defendants had further shown the relevance of such testimony, and (4) the government had then refused to provide the defendants with such testimony, this court might find a lack of due process. The record in this case shows absolutely no such attempt by any of these defendants. The fact that the burden of producing testimony or witnesses was on the defendants does not, without more, violate due process.

Moreover, had the defendants initially requested the attendance of particular witnesses at a hearing, as did the *Doko Farms* defendants, the government presumably would have responded as it did to Doko's request:

> Considerable expense would be incurred at either your cost or that of the Department in making the employees that you have requested as witnesses available at the hearing. However, if you can justify a necessity for the production of any such employees as witnesses based upon grounds that would constitute a reasonable basis for belief that material information is held by the employee and state what new material evidence may be produced by your examination of the witness, we will again consider your request.

Letter from Victor Senechal to Jim Milam dated January 31, 1975, Plaintiff's Post-Hearing submission. Again, however, no such request was made by the defendants.

The argument made by defendants here is identical to the due process argument in the *Jones* case—which was ultimately rejected by this court and affirmed by the Fifth Circuit. *United States v. Jones, supra.* In *Jones,* this court remanded the case to the agency for the examination of witnesses who had previously been requested by the defendants. The defendants produced portions of transcripts and letters, many of which are identical in content to those produced by defendants here, making the same broad objections to lack of opportunity for cross-examination. But the defendants failed to produce any evidence showing their efforts to obtain witnesses, and summary judgment was therefore granted in favor of the United States. The defendants here have also failed to produce evidence of any attempt to procure witnesses.

VI.

Next, defendants contend they were denied due process because of the "improper interposition of the ASCS Hearing Officer Adams, in the administrative process . . . and . . . prejudgment and bias." The position of Adams as both a participant in the investigation and on adjudication has been addressed by this court in *United States v. Jones, supra* at page 8:

> The combination of adjudicative functions with other roles does not, without more, constitute a due process violation creating an unconstitutional risk of bias. *Withrow v. Larkin,* 421 U.S. 35 (1975). If Adams had had a pecuniary interest in the outcome of the case, or if he had been personally

> abused or criticized by the defendants, their impermissible risk of bias would exist. *See Withrow, supra* at 47. The court finds nothing and has been directed to nothing in the record before it, however, which would suggest personal or actual bias in Adams.

Because the defendants here have pointed to no bias other than that of Adams' dual-position, there is no violation of due process.

VII.

Defendants next argue that their actions, upon which the Government asserts liability, were "taken in reliance upon the prior advice of the Plaintiff's authorized representatives." Defendants argue that the United States is thus precluded from asserting liability on grounds of *ex post facto* laches and estoppel. This argument is without merit. *See Federal Crop Insurance Corporation v. Merrill,* 332 U.S. 380 (1947).

VIII.

The defendant Lemmons introduced at the hearing at Lubbock, Texas on May 23, 1984, a letter dated April 26, 1974 to Lemmonumental Farms, regarding the redetermination of liability of Johnny Lemmons, Bert Lemmons, and Melvin Bradley, stating at follows:

> Accordingly, I have determined that you did not knowingly adopt a scheme or device to defeat a purpose of the program and that you relied, in good faith, on erroneous information or advice furnished by the Gaines County ASCS Committee or its representative.

Defendant Lemmons argues that he therefore cannot be held liable under 7 C.F.R. § 722.817. The letter quoted above, however, goes on to state that the recommendation was made "pending redeterminations to be made with respect to Johnny Lemmons *as a result of his participation on other farms.*" (emphasis added). In this Motion for Summary Judgment, the government is seeking refund from defendant Lemmons based on his joint and several liability with defendants Batson and Bowman. The administrative record attached to the United States' Motion for Summary Judgment contains specific findings that Batson and Lemmons, and Bowman and Lemmons, acted "knowingly."

IX.

For the first time at the hearing, the defendants brought to the attention of the court the judgment recovered by the government against Jon-T. Chemicals, et al., in CA-5-78-75A, which judgment was based against the defendants in that case on all or many of the transactions involved in these seven cases. It was defendants' contention that they would have a right of contribution against Chemicals and others and that the government should not be allowed to have a double recovery against the defendants in this case as well as against Jon-T. Chemicals.

To afford defendants any relief on this basis would be based on conjecture as to what might happen in the future and the government could at the proper time be precluded from any recovery should that event occur and whether or not these defendants have any right of contribution against Chemicals would depend on facts not before this court.

X.

Under the circumstances shown by the record in this case and as outlined above, the court concludes that the seven determinations and decisions of the ASCS and Department of Agriculture are entitled to finality pursuant to 7 U.S.C. § 1385. The defendants were afforded three hearings at three separate levels and nothing contained in this record would indicate but that a full and fair hearing was afforded on each occasion. Therefore the determinations should be enforced and judgments entered accordingly.

The Clerk will furnish a copy hereof to each attorney and litigant proceeding *pro se.*

ENTERED tnis 12th day of June, 1984.

/s/ HALBERT O. WOODWARD
Halbert O. Woodward
Chief Judge
Northern District of Texas